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Uganda Revenue Authority V Toro & Mityana Tea Co. Ltd- HCT-00-CC-CA-0004-2006 [2007] UGCommC 23 (19 March, 2007)

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL COURT DIVISION]

HCT-00-CC-CA-0004-2006
(Arising out of TAT MA-010/2005)
(Arising out TAT Application No 16/2004)

Uganda Revenue Authority Appellant
Versus
Toro & Mityana Tea Co. Ltd Respondent

19 March 2007

BEFORE: HON JUSTICE LAMECK N MUKASA

JUDGMENT

The brief facts leading to this appeal are that the Respondent, Toro & Mityana Tea Co. Ltd, filed TAT application No. 16 of 2004, before the Tax Appeals Tribunal contesting an assessment of tax in respect of withholding tax on management fees and pay as you earn on expatriate staff salaries and interest on loan accounts for the years 1993 – 2003. The Appellant, Uganda Revenue Authority, filed its Statement of Reason where it attached a list of documents as Annexture "B".
Preceding the hearing of the application a scheduling conference was held at which the parties listed the agreed issues, facts, documents, and witnesses to be relied upon. It did not include the contested documents and H. de Silva was not named as an Appellant's witness. At the hearing, the Respondent prosecuted its case by calling witnesses in support of its claim and closed its case. During the course of cross-examining the Respondent's witnesses the tribunal over ruled the Appellant's attempts to cross-examine the witnesses on the contested documents. At the closure of the Respondent's case, instead of opening its case, the Appellant brought Misc. Application No. 10 of 2005 for Orders that:-

> (i) The Applicant's list of witnesses be amended to include H. De Silva;
> (ii) The Honourable Tribunal issue a commission/letter of request for the examination of H. De Silva from Srilanka ;
> (iii) The Honourable Tribunal appoints a fit and proper examiner/commissioner;
> (iv) Leave be granted to lodge documents listed in Annexture B of the statement of defence (Reasons for the Taxation Decision]
> (v) Costs of the application be provided for and those of the commissioner.

By majority decision, the Tribunal dismissed the application. The Tribunal held that on the authorities of ***Uganda Revenue Authority Vs Toro & Mityana Tea Company Ltd TAT Application No. 8 of 2006*** and ***Uganda Revenue Authority Vs Uganda Consolidated Properties Ltd C AC A No. 31 of 2001*** for the lodging of new documents section 17 of the Tax Appeals Tribunal Act is

substantive procedural law which should be followed to the letter and it is not just a legal technicality. As regards calling H. de Silva and issuance of a commission, it held that the tribunal was not convinced that H. de Silva's evidence was material and crucial to the extent that without it the Tribunal could arrive at a wrong decision or a decision that would be prejudicial to any of the parties to the application. The appellant was dissatisfied with the Tribunal's ruling hence this appeal to this Honourable Court on the following grounds;-

1. That the Honourable Tax Appeals Tribunal erred in law in holding that it has no powers to extend time within which to lodge documents.
2. The Honourable Tribunal erred in law in refusing to issue a letter of commission by holding that the Appellant had not shown the relevancy/importance of the evidence to be adduced by H. de Silva, the former Financial Director of the Respondent.
3. The Honourable Tax Appeals Tribunal erred in law when it ruled that the Respondent should only rely on testimony of those responsible for making assessments to prove its case.
4. The Honourable Tax Appeals Tribunal failed to appreciate the law relating to its discretion to call other witnesses or to get more information.
5. The Honourable Tax Appeals Tribunal erred in law when it relied on an unstamped affidavit in reply to the application.

Counsel for both parties applied and were granted leave to file written submissions which they did. In his submissions Mr. Oscar Kambona, counsel for the Respondent raised two preliminary points of procedure, which I intend to deal with first. Namely that:-

1. The ruling appealed against was interlocutory and as such not appeallable as of right.
2. There was no appeal before court since the Appellant had not filed a memorandum of appeal as required by Order 43 rule 1 of the CPR.

Mr. Ali Sekatawa, in his reply to the Respondents submission, objected to the entertainment of the said preliminary points at this stage. Counsel argued that the matter was res judicata, the Respondent having raised the same grounds or points of law in Misc. Application No. 259 of 2006 arising from this Appeal where he contended that it had been substantially considered and ruling delivered. That no appeal has been preferred by the Respondent and therefore the issues were finally settled. Counsel relied on ***Semakula Vs Susan Magala & 2 others [1979] HCB 9*** where the Court of Appeal held that the plea of res judicata is found in section 7 of the Civil Procedure Act which provides:-

> "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title, in a Court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that Court".

The doctrine of res judicata is fundamentally to the effect that there must be an end to litigation. In determining whether or not a suit is barred by res judicata, the test is whether the Plaintiff in the second suit is trying to bring before the Court in another way in the form of a new cause of action a transaction which has already been presented before a Court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If this is answered affirmatively, the plea of res judicata will then not only apply to all issues upon which the first Court was called upon to adjudicate but also to every issue which properly belonged to the subject of litigation and which might have been raised at the time, through the exercise of due diligence by the parties – see

Kamunye & Others Vs The General Assurance Society Ltd. [1971] EA 263.

Miscellaneous Application No. 259 of 2006 was for stay of proceedings in TAT Application No. 16 of 2004 pending the disposal of Miscellaneous Application No. 259 of 2006 also arising from this Appeal. I have studied the record of proceedings and ruling therein and found that the same points of law were raised before and adjudicated upon by the learned Deputy Registrar. There has been no appeal against the Deputy Registrar's ruling on the said points and the Respondent is raising the same points as preliminary points of procedure. I therefore agree with the Appellants submission that the points are res judicata.

Despite my holding above, I will proceed and consider the points raised. Regarding the first point that as interlocutory ruling, the ruling was not appeallable as of right Mr. Kambona submitted that the law relating to appeals from decisions of the Tax Appeals Tribunal is section 27 of the Tax Appeals Tribunal Act, Cap 345. He argued that under the section an appeal only lies from the decision of the Tax Appeals Tribunal and not from an Order and the decision therein is a final taxation decision of the Tribunal which is not the case in the instant matter. He cited ***Charles Harry Twagira Vs Uganda SCCA No. 27 of 2003*** where the Justices of the Supreme Court held that interlocutory rulings are not appeallable as of right. That it is wrong for a person to launch appeals against interlocutory orders made during trials as this is likely to prolong trials by litigants lodging appeals on every point of objection. That appeals as of right from orders are regulated by section 76 and 77 of the Civil Procedure Act read together with Order 44 rule 1 of the Civil Procedure Rules. He contended that this appeal is not covered by the above provisions. Counsel submitted that to have this appeal properly before Court the Appellant was required to have first sought leave of the Tribunal. Counsel made reference to ***Attorney General Vs Shah (No. 4) [1971] EA 52*** where Spry Acting President stated:-

> "It has long been established and we think there is ample authority for saying that appellant jurisdiction springs only from statute. There is no such thing as inherent appellant jurisdiction...."

Counsel contends that appeals from decisions of the Tax Appeals Tribunal are governed by section 27 of the Tax Appeals Tribunal Act. The section provides:

> "27(1) A party to a proceeding before a tribunal may, within thirty days after being notified of the decision...lodge a Notice of Appeal with the registrar of the High Court and the party so appealing shall serve a copy of the notice of appeal on the other party to the proceeding before the tribunal."

If I understood counsel properly his contention is that an appeal from the decision of the Tax Appeals Tribunal is as of right by statutory provisions of the above section but that the decision envisaged by the section is a final taxation decision and not an interlocutory order as the one before this Court. On the other hand, counsel for the Appellant submitted that the above law provides for appeals against decisions of the Tribunal. That it is irrelevant whether it is interlocutory or a final decision.

The same point was raised by Mr. Kambona in Misc. App, No. 259 of 2006 also arising from this Appeal. In my ruling therein, I referred to the Blacks Law Dictionary 7th Ed which defines "decision" as:-

> "A judicial determination after consideration of the facts and the law, especially a ruling, order or judgment pronounced by a Court when considering or disposing of a case".

I held and I so hold that such decision could be final or interlocutory. Section 27 above by use of the wording "against the decision of the tribunal ..." includes all interlocutory and final decisions of the

tribunal. Therefore, it makes both interlocutory and final decisions of the tribunal appeallable to the High Court immediately as of right. The section makes specific provisions thus ousting the applicability of Order 44 rule 1 of the Civil Procedure Rules.

As regards the issue whether there was a competent appeal before this Court Mr. Kambona argued that the appellant has not filed a memorandum appeal as required by Order 43 rule 1 (I) of the Civil Procedure Rules which provides:-

> "Every appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his or her advocate presented to the Court or to such officer as it shall appoint for that purpose."

Counsel drew my attention to the Record of Appeal filed in Court on 23rd June 2006. The list of contents of the Record provides that the Memorandum of Appeal is on page 5 of the Record. Counsel argued that there is no such Memorandum at page 5 of the Record. He observed that the last paragraph of the document on that page states:-

> "Other grounds shall be raised in the Memorandum of Appeal."

Mr. Kambona's argument, as I understood it, is that the Appellant thereby envisaged filing a Memorandum of Appeal. He therefore submitted that the Appellant is yet to properly file the appeal in accordance with Order 43 by filing a Memorandum of Appeal.

The document at page 5 of the Record is a photocopy of the document filed on 13th March 2006. The sentence in the document and quoted above should not be considered in isolation from the body of the entire document. The document also has the following statements:-

"Appeal from ruling and order of the Tax Appeals Tribunal sitting at Kampala dated 28th day of February 2006.
Uganda Revenue Authority the appellant above named appeals to the High Court against the whole of the above ruling and orders on inter alia, the following....".

The document goes on to give the grounds of appeal that are numbered from 1 to 5. Then comes the unfortunate sentence. This is followed by the orders to be prayed for. It is signed by counsel for the Appellant. Sub – rule 2 of rule 1 Order 43 provides:-

> "The memorandum shall set forth, concisely and under distinct heads the grounds of objection to the decree appealed from without any argument or narrative and the grounds shall be numbered consecutively."

If that unfortunate sentence was to be struck out the document would clearly answer the requirement of a memorandum under the provisions of the rule.

However it could be argued that since the document at page 5 of the record was just a photocopy of the document filed on 13th March 2006, it is only a Notice of Appeal, yet order 43 rule 1 (1) CPR mandatorily requires every appeal to the High Court to be preferred in the form of a Memorandum. Regarding this point, Mr. Sekatawa, for the Appellant, submitted that a Notice of Appeal under section 27(2) of the TAT Act fulfils the requirements of Order 43.

Order 43 rule 1 (2) CPR requires the memorandum of appeal to set the grounds of objection to the decree appealed from. Under section 27 TAT Act appeals are only on questions of law. Subsection 2 requires the notice of appeal to state the question of law that will be raised on appeal. It provides:

> "(2) An appeal to the High Court may be made on questions law only, and the Notice of

Appeal shall state the question or questions of law that will be raised on the appeal."

In other words, the section requires the Notice of Appeal to set forth the grounds of objection. Rule 30 of the Tax Appeals Tribunal (Procedure) Rules only make the High court rules of practice and procedure – that is the Civil Procedure Rules - applicable if the said TAT (Procedure) Rules do not provide for. Section 27 above specifically provides that an appeal from the Tax Appeals Tribunal to the High Court shall be by Notice of Appeal lodged with the Registrar of the High Court and the Notice of Appeal shall state the questions of law that will be raised on appeal. That is a specific type of appeal. The section negates the requirements of Order 43 CPR. See ***Uganda Communications Commission Vs Uganda Revenue Authority HCT 00-CC-MA-775 – 2006.*** Therefore even if the document at page 5 of the Record is only regarded as a Notice of Appeal it satisfies the specific provisions of section 27 T A T Act whereby an appeal is commenced by lodgement of a Notice of Appeal with the Registrar of the High Court stating the questions of law to be raised.

In the result the two preliminary points are over ruled. I now proceed to consider the merits of the appeal.

Ground 1: That the Tax Appeals Tribunal erred in law in holding that it has no powers to extend time within which to lodge documents.

TAT Misc. Application No. 10 of 2005 was brought under section 17 of the TAT Act, among other provisions. The section provides:

" (1) Subject to this section, not later than thirty days after being served with a copy of an application to a tribunal to review a taxation decision, the decision maker shall lodge with the tribunal two copies of –

i. the notice of the decision;
ii. a statement giving the reasons in the decision maker's possession or under his or her control which is necessary to the tribunal's review of the decision.
iii. Every other document in the decision maker's possession or under his or her control which is necessary to the tribunal's review of the decision (See also Rule 14 TAT (Procedure) Rule).

(2) Where the tribunal is of the opinion that there may be :-

(a) particular other documents; or
(b) other documents included in a class of documents, which may be relevant to the review of a decision by the tribunal, the tribunal may by notice in writing, require the decision maker to lodge with the tribunal the documents specified in the notice to the extent that those documents are in the person's possession or under his or her control.

(3) This section has effect notwithstanding any rule of law relating to privilege or the public interest in relation to the production of documents."

The application was for leave to lodge documents listed in Annexture "B" of statement of defence. In paragraphs 9-11 of the affidavit in support of the application it was averred as follows:-

"9. That the documents listed in Annexture "B" of statement of reasons were voluminous/bulky (4 boxes) but the Applicant has sorted out the relevant documents of substantial value to the determination of the issues before the tribunal to wit-

(i) The Company's Audited Documents,
(ii) The Companies Cash Books.
(iii) The Debit Notes.

(iv) Bank Statements/Telegraphic Transfers.

(vi) Management Accounts.
(vii) Forex Journal Voucher files.
(viii) Cash Book

10. That the documents in Annexture 'B' of reasons were listed but have not been lodged due to the comprehensive investigations into the tax affairs of the Respondent/Plaintiff. That the said documents belong to the Respondent/Plaintiff and hence cause no prejudice to either party."

The said documents were among the documents seized by the Appellant from the Respondent. The Appellant had moved the Tribunal to exercise its discretion under section 17(2) above to admit lodgement of the documents which were in the Appellant's possession, listed in its statement of reasons but not lodged as required by sub-section 1(c) of the said Act.

The tribunal in its ruling stated:-

"As for lodging new documents, both the tribunal and the Court of Appeal have made a decision to the effect that section 17 of the Tax Appeals Tribunal Act is substantive procedural law, which should be followed to the letter and it is not just a legal technicality. These decisions are contained in ***Uganda Revenue Authority vs. Toro Mityana Co. Ltd.(Misc. App. No 8/2006)*** and ***Uganda Revenue Authority vs. Uganda Consolidated Properties Ltd CACA No. 31 of 2001."***

In ***Misc. App. No. 8 of 2006 URA Vs Toro Mityana & Tea Co. Ltd*** the Tribunal held:

"The Tribunal agrees with the Respondent that it has no legal authority under section 17 of TAT Act to allow late introduction of documents which were not lodged with the statement of Reason for the Taxation."

Counsel for the Appellant submitted that the Tribunal was relying on the force of the Court of Appeal Judgment's interpretation of section 17 of the TAT Act in ***URA Vs Uganda Consolidated Properties Ltd CACA No. 31 of 2001.***

Counsel distinguished the Court of Appeal decision from the present application. He argued that the Court of Appeal therein considered section 17 TAT Act of 1997 which is the present section 16 of the TAT Act Cap 345 under the new Laws of Uganda (Revised Edition) yet Misc. Application 10 of 2005 was made under the present section 17 of Cap 345 of the Laws of Uganda. Counsel pointed out that whereas section 16 TAT Act Cap 345 (formerly section 17) deals with time within which applications for review of objection decisions have to be filed, the present applicant was brought under section 17 (New Laws) which deals with filing of Statement of Reasons. Counsel argued that the two sections should be considered separately and Court makes a decision on the applicability of section 17(2) Cap 345 visa-avis powers of the tribunal to allow documents in possession of the decision maker – the Appellant.

In ***Uganda Revenue Authority Vs Uganda Consolidated Properties Ltd [1997 -2001] UCL 149,*** Uganda Consolidated Properties Ltd, lodged an Appeal in the High Court against the ruling of the Tax Appeals Tribunal, which dismissed its application for review of a taxation decision on grounds that it was time barred. The High Court upheld the appeal and ordered the Tax Appeals Tribunal to hear the application. URA appealed against the High Court Judgment to the Court of Appeal. The issue at hand was an application for review of a taxation decision which was the subject of section 17 the Tax Appeals Tribunal Act, the current section 16. In his judgment Justice Twinomujuni JA at

page 155, in reference to section 23 (now section 22) of the Act, stated:

> "With respect, my understanding of this provision is that the procedure to be followed by the Tribunal is only discretionary subject to the Act. In other words, where the Act and the Rules made there under specifically about procedure are to be followed on any matter, then the discretion of the Tribunal is limited to that extent. In my judgment section 23 (now 22) of the Act does not relieve the Tribunal from the mandatory requirement of section 17(1) (c) (Now 16 1 (c)) of the Act which requires that applications for review be filed within thirty days after the person making the application has been served with notice of a tax decision."

The learned Justice of Appeal went on and held:-

> "....Time limits set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with."

The above judgment binds both the Tribunal and this Court. However, I agree with Mr. Sekatawa that the subject matter in the above case was an application for review under the current section 16 of the TAT Act and not an application to lodge documents under the current section 17 of the Act. I must also point out that the learned Justice did not address subsection (2) of the section which grants the Tribunal the right to extend the time on written application by the applicant for review.

Mr. Kambona on the other hand argued that whereas the above case was interpreting the provisions of section 16, formerly section 17, as for as the question of time limits is concerned, the decision of Justice Twinomujuni JA is instructive. In his judgment, Justice Twinomujuni did not limit himself to time limits set by the section under consideration but extended to time limits set by statutes and held that they are "matters of substantive law and not mere technicalities and must be strictly complied with." The statute could be any, not necessarily the TAT Act. Section 17 (1) (c) requires the decision maker (URA/Appellant) to lodge documents in the decision marker's possession or under his or her control which is necessary to the tribunal's review of the taxation decision within thirty days. Unlike section 16, this section does not provide for extension of the time within which to lodge the documents upon application of the decision maker. Instead under sub-section 2 of the section the tribunal has the discretion to "by notice in writing, require the decision maker to lodge with the tribunal the documents specified in the notice to the extent that those documents are in the person's possession or under his or her control." Such documents should be those "which may be relevant to the review of a decision by the Tribunal." The tribunal's discretionary power must be exercised judiciously. The Tribunal ought to judiciously consider whether the documents in issue are relevant to the review of the taxation decision in dispute and then give notice to the decision maker to lodge the documents. Also under section 21(2) (b) of the TAT the Tribunal has powers to order for the production of books and documents.

The issue is whether under section 17 (2) of the Act, the Tribunal can be moved by any party to exercise its discretion to order the production of documents. The tribunal can only exercise its discretion upon getting notice of a document or documents which in its opinion may be relevant for review. There is no procedure prescribed as to how the Tribunal may initiate proceedings to exercise that discretionary power. In ***M/S Gulu Municipal Council Vs Nyero Gabriel & other HC Miscellaneous Appeal 5 of 1997*** while considering whether section 84 (now 83) of the Civil Procedure Act confer a right on an aggrieved party to initiate Revision Proceedings in the High Court Justice G.M Okello stated:

> "There is no prescribed procedure to initiate Revision Proceedings. There is no prohibition of the revision proceedings being initiated by an application of an aggrieved party moving the Court to exercise its power under section 84 (now 83) of the CPA.

> Then the parties would be heard in terms of the provisions of section 84 (now 83) of the Civil Procedure Act before the Court revised the decision of the subordinate Court."

The above position in respect to section 83 CPA can provide guidance in respect to the Tribunal's exercise of its power under section 17 (2) TAT Act. Therefore, a party can move the Tribunal to exercise its discretion, as was the case in the instant application.

Having been so moved the Tribunal on the authorities already stated above declined to consider the application for lodgement of the documents. In ***GUS Merchandise Corp. Ltd Vs Customs and Exercise Commissioner [1992] STC 776,*** the Value Added Tax Tribunal rejected documents not listed and lodged by the Commissioner. The applicant company called its only witness and closed its case. The Commission called three witnesses and thereafter sought leave to have certain documents not listed or exhibited. The Applicant Company objected and the Tribunal without examining the contents of the documents, held it was not admissible or that it should not be introduced at the late stage of the proceedings because there had been no reference to it prior to the hearing. The Commission appealed against that ruling upon the ground that "*The tribunal erred in law in that it wrongly excluded the introduction by the Commissioner of certain documentary evidence."*

The Value Added Tax Tribunal Rules 1986 which were the subject of consideration in the above case had the following provisions:-

> " Rule 19 (5): A tribunal may, of its own motion or on the application of any party to an appeal or application, waive any breach or non observance of any provisions of these rules or of any decision or direction of a tribunal upon such terms as it may think just."
>
> "Rule 20 (1): " The parties to an appeal --- shall --- serve at the appropriate tribunal centre a list of the documents in his possession, custody or power which he proposes to produce at the hearing of the appeal or application."
>
> "Rule 20 (3): "--- a tribunal may, where it appears necessary for disposing fairly of the proceedings --- direct that the other party to the appeal shall serve to the appropriate tribunal Centre --- a list of the documents ---."

Court observed that no such order had been made under the above sub-rule in the above case.

Referring to the above rules **Rose J.** stated**:**

> "...Although the rules clearly distinguish between the obligation to look at documents which are included in the list and the mandatory terms in that regard, it does appear to me that the tribunal, which is the master of its own procedure, subject to the rules, does have a discretion as whether or not to admit documents which are not listed in the list of a party to the appeal. The question which here arises is whether that discretion has been properly exercised or has been exercised on a wholly inappropriate basis."

Her Lordship then held:-

> "...it is surprising that a tribunal whose responsibilities are legal as well as factual did not look at the documentation before deciding whether it should or should not be introduced into the proceedings. If the tribunal had looked at this correspondence, in my judgment it could not have failed to conclude that it was potentially of considerable significance."

Section 17 (1) of the TAT Act imposes a mandatory duty on the decisions – maker within 30 days to lodge with the tribunal two copies of every document in its possession or control necessary to the tribunals review of the decision. However as the opening phrase of the section – "subject to this section" -show that mandatory requirement is subject to the Tribunal's discretion under subsection 2 thereof to require the decision maker to lodge with the tribunal documents in his possession or control which in the tribunal's opinion may be relevant to the review of the decision. There is no limitation as to the time within which the tribunal can exercise its discretion under the sub-section. It can be exercised at any time of the proceedings. The limitation in section 1 is the one which is subject to the other provisions in the section.

Also section 22 of the Act, subject to the Act, puts the procedure of the tribunal within the discretion of the tribunal. Considering all the above I find that in holding that it had no powers to extend the time within which to lodge documents the tribunal was running away from its judicial duties. The Tribunal should have considered the documents in issued and judiciously exercised its discretion whether or not cause the documents to be lodged before it. Therefore, the first ground of appeal is resolved in the affirmative.

Grounds 2 3 and 4 were addressed jointly since they all raised substantially a similar issue of whether the tribunal properly exercised its discretion when it refused to include H. de Silva as a witness and to issue a commission or letter of request to have H. de Silva examined.
In the application, the appellant applied for orders to include H. de Silva as a witness, and the Tribunal to issue a commission/letter of request for the examination of H. de Silva from Srilanka. In the affidavit in support of the application it was averred that H. de Silva was the Respondent's financial Manager/Director from September 23rd 1993 to 29th July 2003 and was the Respondent's point man in most of the transactions and communications being the signatory, recipient and in some instances executing the respective order/directives and therefore well conversant with the financial transactions of the Respondent. That as the financial Manager/Director of the Respondent Company during the time in issue he was a material/principal witness and his testimony is vital to the substantive determination of the issues before the tribunal. In his affidavit in support of the application H. de Silva stated:-

> "4. That as a former Finance Manager/Director am aware and well conversant with all the financial affairs and dealings of the Company in respect of the taxes in dispute."

The said H. De Silva had not been listed as a witness. In his submission before the Tribunal Counsel for the Appellant argued that H. De Silva was of fundamental value to the substantive determination of the issues in the main application.

Under section 21 (4) of the TAT Act the Tribunal has power to issue a commission or request to examine a witness abroad. The Appellant's case was that H. De Silva was living in Srilanka but had declined to fly back to Uganda due to personal security reasons. Thus the application for issuance of the commission/letter of request to have H. De Silva examined from Sri Lanka. In the Respondent affidavit it was contended that H. De Silva's reason for failure to come to Uganda was the fact that he was facing Criminal charges before the Chief Magistrates Court Buganda Road under Criminal Case No. 1397 of 2003 and had been issued with a warrant of arrest after he had failed to appear in Court and had to-date remained elusive and at large.

Before the Tribunal Counsel for the Respondent opposed the application. He argued that Counsel for both parties had held a scheduling conference almost a year ago and agreed on the facts, the witnesses and documents each will rely on. H. de Silva had not been named as a witness. He relied on the then equivalent of Order 12 rule 3 CPR which provides that interlocutory applications, where there has been no alternative dispute resolution, shall be filed within 15 days after the completion of

the scheduling conference, which date shall be referred to as the cut off date. It was further argued that the application for the commission/letter of request to examine H. De Silva from Srilanka was not brought in good faith for the justice of the case.

In its ruling, the tribunal stated-

> " As for the application for the issuance of a commission, the Applicant/Respondent does not show how or let alone the importance of the evidence of one H. de Silva who was a financial Director at the time the assessment would assist the Applicant/Respondent in justifying the correctness of the assessment. Instead, the Tribunal would expect the Applicant/Respondent to bring evidence of those responsible for making the assessment to testify and not H. de Silva who even if he was in full charge of the operations of the Respondent/Applicant is not party to the assessment. The Applicant/Respondent has not convinced the Tribunal that the evidence/testimony of H. de Silva is material and crucial to the extent that without it the Tribunal could arrive at a wrong decision or a decision that would be prejudicial to any of the parties to this application."

The Tribunal's power under section 21 (4) TAT Act is discretionary which it must exercise judiciously and in accordance with the law. In ***Mbogo & Anor Vs Shah [1968] EA 93*** New bold P. stated-

> "...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong conclusion or decision, or unless it is manifest from the case as a whole that the judge has clearly wronged in the exercise of the discretion and that as a result there has been injustice."

Also in the case of ***Peter Mulira Vs Mitchel cotts Ltd Civil Appeal No. 16 of 2002*** it was held that "it is well settled that an appellate court will not interfere with the exercise of discretion unless there has been failure to take into account a material consideration or an error in principle was made."

Counsel for the Appellant submitted that the Tribunal failed to have a holistic and exhaustive scrutiny or analysis of the pleadings before it and thereby reached a wrong conclusion. As to the ingredients or test of issuance of a letter of commission counsel referred to the case of ***Premchand Raichand Ltd & Anor Vs Quarry Services of East African Ltd & others [1969] EA 514.*** In that case it was held that whether to issue a Commission or not was a matter for the judge's discretion and there is no right to have evidence taken on commission. As to the considerations which should govern the granting or refusal of an application for a commission to take evidence abroad Spry JA stated:-

> "--- The basic principle is that so far as possible all evidence in a suit should be taken viva voce before the trial Court. Anyone who seeks to have evidence taken any other way is seeking an indulgence from the Court and must show good reason to justify his application. It follows from this that the application must be made bona fide and without any avoidable delay. As far as the evidence of parties is concerned, the onus on a Plaintiff will normally be substantially heavier than that on the defendant because the plaintiff will have chosen the forum. The onus will also be heavier where the evidence required is that of a party than where it is the evidence of any other person, because the unwillingness of a party to come, as opposed to his inability, is no reason to allow a commission, whereas a party cannot compel the attendance of a witness who is outside the jurisdiction. In every case, the Applicant must show, first, that the evidence is

> necessary and secondly, that there is some good reason why he should be excused appearing or calling his witness, as the case may be, in person. In the case of a party, there may be some personal reason, such as ill – health or inability to obtain a visa. In the case of a witness there may be some similar reason or the application may be based on his refusal to attend. Expense is also a relevant factor; although now days the cost of air travel will often be no more than the expense of a Commission. The nature of the evidence to be taken is also highly relevant, for example a commission will more readily be issued where the evidence required is of a formal nature than where exhaustive cross-examination is likely."

In ***Hariprased R. Patel Vs Badubhai K. Patel [1994] 1 KALR 77,*** while considering Courts powers to issue a commission for examination of any person resident beyond the local limits of its jurisdiction Kireju J held that Court is given wide discretion under Order 25 (now 28) of the Civil Procedure Rules but it must be judicially and not arbitrarily exercised. That a Commission does not issue as of right to the person applying for it, it has to be justified by showing good reasons. In ***Balten & Others Vs Kampala African Bus Company [1959] EA 328*** Sir Andley McKisack, CJ held:-

The general principle, as stated in the 6th Edition of the AIR COMMENTARY (p3543) is that Court is not bound to issue on commission if it "may result in manifest – injustice to any party, or where it is not calculated to permit of evidence being tested fairly, or when the application is made to avoid cross-examination before the Court."

In the instant case the tribunal held that the Appellant had not shown how H. de Silva's evidence would assist the Appellant to justify the correctness of the assessment. In other words that the Appellant had not shown good reason to justify the application. The Tribunal further held that the Appellant had not convinced it that H. de. Silva's evidence was materially crucial to the extent that without it the Tribunal could arrive at a wrong decision that would be prejudicial to any of the parties to the application. That is that the Appellant had failed to satisfactorily show that H. de Silva's evidence was necessary. The above decisions were arrived at by the Tribunal in exercise of its judicial discretion applying the right principles. In the main application the Respondent is contesting an assessment of tax by the Appellant for the period 1993 – 2003 over which period H de Silva was the Respondent's financial Manager/Director. It was not disputed that in that capacity he was aware and conversant with the financial affairs and dealings of the Company in respect of the taxes in dispute. I agree with counsel for the Appellant that the Appellant has the option to bring any number of witnesses and need not only be limited to persons involved in the assessment. However, in its affidavits in support of the application it is not averred anywhere that the said H. de Silva was the only competent witness. That there was no other person aware and conversant with the financial affairs and dealings of the Respondent Company.

The Appellants evidence is that H. de Silva had refused or was unwilling to come and testify in Uganda due to personal security reasons. Those security reasons are not disclosed in the Appellant's affidavits. However, the undisputed averment in the affidavit in reply show that the said H. de Silva was a wanted criminal suspect who had failed to appear in Court and subject to a warrant of arrest. I am alive to the provisions of Article 28 of the Constitution that a person is innocent until proved guilty. However, by issuing the commission the Tribunal would be abetting or aiding the said H. de Silva to keep away from justice. The Appellant's failure to disclose the actual reason for his refusal to come to Uganda makes the application not bona fide.

The main application was filed in 2004 and the application appealed against filed on 19th October 2005. By the time the application was filed almost a year had lapsed after the scheduling conference at which agreed facts, the witnesses that each party will call and documents each will rely on had been recorded. Hearing had commenced and the Respondent had closed its case. It was at the stage

of calling its witnesses that the Appellant filed the application to call H. de Silva as a witness who had not earlier been listed as a witness. In its affidavit in support deponed to by Semakula Musisi, the Appellant shows that from the documents seized and on which the contested assessment was based, it had become aware that H. de Silva was the Respondent's financial Manager/Director, the Respondents point man in most of the transactions and communications being the signatory, recipient and in some instances executing the respective order/or directive and thus a material, principal or vital witness. With such knowledge and belief the Appellant does not explain why it did not include H. de Silva in its list of witnesses and does not explain why it took so long to make the application for the amendment of the list of witnesses until its turn to call witnesses had arisen. The Appellant had made no attempt to show that the delay was unavoidable.

Applying the principles governing the issuance of commission I find that the Tribunal came to the right decision when it declined to issue a commission/letter of request for the examination of H. de Silva from Srilanka. The 2nd 3rd and 4th grounds of appeal accordingly fail.

The fifth ground of appeal that the Honourable Tax Appeals Tribunal erred in law when it relied on an unstamped affidavit was abandoned by counsel for the Appellant. I therefore make no finding on it.

Finally, I would hold that:-

> (i) The Appellant's application to include H. de Silva as a witness and to issue a commission or letter of request to have H. de Silva examined in Srilanka was properly rejected by the Tribunal.
> (ii) The Tribunal erred in law when it held that it had no powers to extend time within which to lodge documents. I accordingly order that the Tribunal should hear the application for leave to lodge documents listed in Annexure "B" of statement of defence on merit.

The appeal has been successful only on one ground. Therefore, Appellant is awarded 30% of the taxed costs of this Appeal.